Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ABDELHAMID BELLI,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS PERRILL ADAMS
Counsel of Record
631 St. Charles Ave.
New Orleans, LA 70130
Telephone (504) 523-3815
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

The questions presented are:

1) Whether the United States Court of Appeals, which exercises de novo review over questions of law, may, without reasons given, affirm an administrative asylum denial by simply invoking a deferential "substantial evidence" judicial review standard, where nonfrivolous legal issues have been raised on appeal?

2) Whether the Board of Immigration Appeals erred as a matter of law in the present case by requiring a showing that atrocities committed by the Algerian military were pursuant to government policy, and that the Algerian government had been condemned by "international governmental bodies"?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions and Judgments Below 1

Statement of Jurisdiction 1

Statutes and Regulations Involved 2

Statement of the Case 3

I. Basis for Federal Jurisdiction in the Court of First Instance 3

II. Statement of Facts 4

III. Proceedings Below 6

Reasons for Granting the Writ 7

Argument 10

I. The United States Court of Appeals, which exercises de novo review over questions of law, may not, without reasons given, affirm an administrative asylum denial by simply invoking a deferential "substantial evidence" judicial review standard, where nonfrivolous legal issues have been raised on appeal 10

II. The BIA erred as a matter of law in the present case by requiring a showing that atrocities committed by the Algerian military were pursuant to government policy, and that the Algerian government had been condemned by "international governmental bodies" 12

Conclusion 17

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Abdel-Masieh v. USINS, 73 F.3d 579 (5th Cir. 1996) 10

Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985) 14

Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1985) 14

Carbajal-Gonzalez v. INS, 78 F.3d 194 (5th Cir. 1996) ...7, 9

Diaz-Resendez v. INS, 960 F.2d 493 (5th Cir. 1992) 10

Ganjour v. INS, 796 F.2d 832 (5th Cir. 1986) 10

INS v. Elias-Zacarias, 502 U.S. 478 (1992) 9, 10, 11

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 9, 11

M-A- v. U.S. I.N.S., 899 F.2d 304 (4th Cir. 1990)..... 13, 14, 15, 16

Mikhael v. INS, 115 F.3d 299 (5th Cir. 1997)..... 11

Ng Fung Ho v. White, 259 U.S. 276 (1922) 8

N.L.R.B. v. Amalgamated Cloth. Wkrs. of Amer., AFL-CIO, L.990, 430 F.966 (5th Cir. 1966) 8

Sanon v. INS, 52 F.3d 648 (7th Cir. 1995) 11

Zamora-Garcia v. INS, 737 F.2d 488 (5th Cir. 1984) 10

ADMINISTRATIVE DECISIONS

Matter of A-G-, 19 I&N Dec. 502 (BIA 1987) 12, 13, 14, 15, 16

Matter of Izatula, 20 I&N Dec. 149 (BIA 1990) 13

Matter of Salim, 18 I&N Dec. 311 (BIA 1982)..... 13, 15, 16, 17

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

United States Code:

former 8 U.S.C. Sect. 1105a(a) 3

8 U.S.C. Sect. 1101(a)(42) 2, 6, 10, 12

8 U.S.C. Sect. 1158 6

8 U.S.C. Sect. 1251(a)(1)(B) 6

28 U.S.C. Sect. 1254(1) 2

Court Rules:

SUP. CT. R. 20.1 2

Secondary Sources:

THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL (1994) 8

McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U.Penn. L. Rev. 777 (1981) 8

OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (Geneva, 1979) 12

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT:

Petitioner, Abdelhamid Belli, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgments of the United States Court of Appeals for the Fifth Circuit entered in this matter on March 25, 1999.

OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered on March 25, 1999, are reprinted in the Appendix to this Petition at pages App. 1 through App. 2. The order of the United States Court of Appeals for the Fifth Circuit, denying a stay of issuance of its mandate, entered on May 4, 1999, is reprinted in the Appendix at pages App. 3 through App. 4. The decision and order of the Board of Immigration Appeals, filed June 9, 1998, are reprinted in the Appendix at pages App. 5 through App. 8. The decision and order of the Immigration Judge, filed November 1, 1996, are reprinted in the Appendix at pages App. 9 through App. 14.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 25, 1999, affirming the Board of Immigration Appeals' decision

dated June 9, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254(1) and SUP. CT. R. 20.1.

STATUTES INVOLVED

This case involves the following provision of the United States Code:

8 U.S.C. Sect. 1101(a)(42)

The term "refugee" means:

> (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or
>
> (B) in such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited,

assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

Abdelhamid Belli herein seeks review of the decision by the Court of Appeals for the Fifth Circuit on his Petition for Review taken from the administrative decision by the Board of Immigration Appeals ("BIA") in deportation proceedings. The Fifth Circuit's jurisdiction was invoked under former 8 U.S.C. Sect. 1105a(a), which established the exclusive procedure for judicial review of such administrative decisions under then-applicable law.

II. Statement of Facts

Abdelhamid Belli is a native and citizen of Algeria. His country is undergoing a period of severe strife, with a popular Muslim fundamentalist movement ("FIS") pitted against the military government. Algeria was controlled by its military ever since gaining its independence from France in 1962. Certified Administrative Record ("A.R."), as filed with the U.S. Court of Appeals for the Fifth Circuit in Case No. 98-60409, at 116. A constitution was adopted in 1989 which called for a transition from this autocratic regime to a multiparty democracy, but subsequent elections were canceled as soon as it appeared that FIS would win power; the government then declared a state of emergency, banned FIS, and jailed most of its leaders. A.R. at 116.

After a military coup, control passed to a five-man committee, and thence to a former general. A.R. at 116; 232; 273. Since then, FIS has waged a violent campaign against the military regime, which has responded by committing countless human rights violations, through its security forces, against FIS and against the population at large. A.R. at 172-338. Mr. Belli fears persecution in his home country by the government because he served as a corporal in the military from 1987 to 1989, but refused a mandatory call for reenlistment to fight against the FIS-led uprising after the election cancellation. A.R. at 151-56. Mr. Belli saw no fighting during his stint in the military, as the fundamentalist insurgence was not then a factor. A.R. 86-87. After being released from the military he worked for the Algerian Ministry of Education for some five years. A.R. at 87.

Subsequently the Algerian government announced a mandatory military recall for all who served between 1989 and 1994. A.R. at 88. Between twenty thousand to forty thousand members of the military had deserted, thus explaining the need for the recall. A.R. at 229. Mr. Belli stated that another purpose of the recall was to identify former military who might have joined the ranks of the fundamentalists, and that those who refused to return to service were referred to military courts for punishment. A.R. at 155.

Mr. Belli refused to reenlist, as the strife between the government and the fundamentalists was in full force at the time of the recall, and he knew that he would be required to attack civilians, many of whom were his own neighbors. A.R. at 90-95. He refused to do so as a matter of principle. A.R. at 77. Although he did not agree with the violent methods of the anti-government extremists, he was opposed to the regime in power, which he felt was a "dictatorship" that did not "serve the people." A.R. at 91, 154.

After he heard that officials had come to his home looking for him, Mr. Belli relocated to a different area. A.R. at 156. He feared that he would be jailed for ten to fifteen years, and possibly executed, for avoiding military service. A.R. at 89; 93-94. Returning to the military would also of course mean the possibility of a violent death as a member of the security forces on the front line of fighting against the fundamentalists, as in fact happened to several young men that he knew. A.R. at 155. Mr. Belli also knew that he could be killed by any man on the street as a traitor if he did return to military service. A.R. at 155. Faced with this dilemma, he saw flight as his only option,

and he took that option by traveling to the United States in October 1995. A.R. at 156.

If Mr. Belli should return now to Algeria, he is convinced that the government would persecute him as a presumed fundamentalist and traitor because he refused to fight against the insurrection. A.R. at 93-94. He testified that more visits had been made to his family home in Algeria since he left for the U.S., by officials asking his whereabouts. A.R. at 97.

III. Proceedings Below

INS issued an Order to Show Cause in Mr. Belli's case on March 14, 1996, charging him with deportability under former 8 U.S.C. Sect. 1251(a)(1)(B), for having entered the United States without inspection. A.R. at 341-45. At a final administrative hearing held on November 1, 1996, Mr. Belli was found deportable as charged by an Immigration Judge ("IJ"). The IJ held that he did not qualify as a refugee under the above-quoted 8 U.S.C. Sect. 1101(a)(42), and therefore was not entitled to asylum under 8 U.S.C. Sect. 1158. A.R. at 25-31.

On June 9, 1998, the BIA dismissed Mr. Belli's appeal from the IJ's decision. A.R. 2-3; see Appendix, hereto attached. In so doing, it held that even if he faced disproportionately severe penalties for refusing further military service, or if such service would require him to engage in conduct violative of international warfare standards, Mr. Belli would have to show, and had failed to show, that

such abuses constituted the policy of the Algerian government, and that said government had been condemned by "international governmental bodies." A.R. at 3.

Mr. Belli appealed to the United States Fifth Circuit Court of Appeals, arguing that he had in fact proven that he would either be forced to commit atrocities against his countrymen, or persecuted for refusing to do so; he also argued there was no valid basis for the BIA's requirement of proof that the Algerian government intended atrocities or had been internationally condemned. On March 25, 1999, the Fifth Circuit issued an eight-line decision dismissing Mr. Belli's petition for review, stating merely that "substantial evidence supports the Board's decision," with no further discussion. See Appendix, hereto attached.

REASONS FOR GRANTING THE WRIT

Mr. Belli argued to the Fifth Circuit that the BIA had erred as a matter of law in requiring him to prove that atrocities committed by the Algerian military were pursuant to government policy, and that the Algerian government had been condemned by "international government bodies." The Fifth Circuit denied his petition for review, citing to the deferential "substantial evidence" judicial review standard it followed in *Carbajal-Gonzalez v. INS*, 78 F.3d 194 (5th Cir. 1996), but otherwise giving no reason for its denial.

This was legal error, as argued below. It also extends a disturbing trend in the United States Courts of Appeal, whereby fewer and fewer reasons, or none, are given in

support of case decisions. This trend traces back to the Fifth Circuit's promulgation of a local rule which, in an effort to cope with a greatly increased caseload, allowed certain decisions to be affirmed without opinion. *See N.L.R.B. v. Amalgamated Cloth. Wkrs. of Amer., AFL-CIO, L.990*, 430 F.966 (5th Cir. 1966).

N.L.R.B. itself recognized that this abrogation of the traditional requirement that reasons be given when decisions are made created the potential for abuse. Chief Judge Brown warned that

> (. . .) an articulated discussion of the factors, legal, factual or both, which lead the Court to one rather than another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review.

430 F.3d at 972. Other commentators have also criticized the growing trend away from explicit statement of decisionmaking grounds by the courts. *See, e.g.*, THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL (1994), at 119 ("The ultimate integrity of the appellate process requires that courts state their reasons."), *and* McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U.Penn. L. Rev. 777 (1981).

The "awesome power of almost final review" cited by Judge Brown, and the trend away from reasoned appeal decisions, are all the more disturbing in the context of deportation proceedings, where a denial can lead to the "loss of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276 (1922). This is so a fortiori in an asylum case, which necessarily involves a claim that

deportation may cause persecution and even the loss of life itself. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

The Supreme Court has set forth a judicial review standard applicable to deportation cases, whereby an administrative deportation order will only be overturned if the evidence of record is so compelling that no reasonable factfinder could affirm it. *INS v. Elias-Zacarias*, 502 U.S. 478, 480 (1992). *Elias-Zacarias* was relied upon by the Fifth Circuit in *Carbajal-Gonzalez*, which in turn formed the sole basis, as noted, for the Fifth Circuit's decision in the present matter. As argued below, this standard should not apply to legal issues, over which the Courts of Appeal have de novo review power. Even under the *Elias-Zacarias* standard, moreover, judicial review must rise to certain standards of care, and the Fifth Circuit failed to do so in the present case, as elaborated further below.

As a matter of policy, it is submitted herein that, at least in asylum cases, and at least where a nonfrivolous legal issue has been raised, a deportation order may not be affirmed upon judicial review by mere citation to the *Elias-Zacarias* (or other similar) review standard, without any further reason given. This is an important issue that affects a large number of litigants, and it deserves Supreme Court review.

ARGUMENT

I. The United States Court of Appeals, which exercises de novo review over questions of law, may not, without reasons given, affirm an administrative asylum denial by simply invoking a deferential "substantial evidence" judicial review standard, where nonfrivolous legal issues have been raised on appeal.

The standard of review applicable to the ultimate issue of whether an asylum applicant has demonstrated a well-founded fear of persecution for purposes of 8 U.S.C. Sect. 1101(a)(42) is known as the "substantial evidence" test, whereunder a BIA asylum denial based upon a finding of no well-founded fear of persecution can be overturned only if not supported by "substantial evidence." *Elias-Zacarias, supra,* at 480 (1992). The substantial evidence standard in the asylum context is held to require reversal only where the evidence of record is "such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *Id.*

Even under this seemingly highly restrictive review standard, however, the BIA's decision is reviewed "to ensure that the complaining alien has received full and fair consideration of all circumstances that give rise to his or her claims." *Abdel-Masieh v. USINS,* 73 F.3d 579, 585 (5th Cir. 1996) (citing *Zamora-Garcia v. INS,* 737 F.2d 488, 490 (5th Cir. 1984)). The BIA decision "must reflect meaningful consideration of the relevant substantial evidence supporting the alien's claims." *Id.,* (citing *Zamora-Garcia, Diaz-Resendez v. INS,* 960 F.2d 493, 495 (5th Cir. 1992), and *Ganjour v. INS,* 796 F.2d 832, 839 (5th Cir. 1986)). The general deference accorded to the BIA's expertise in

immigration law matters under the substantial evidence standard still requires proof that the BIA has in fact exercised such expertise in reaching its decision. *Id.* (citing *Sanon v. INS*, 52 F.3d 648, 651 (7th Cir. 1995)). An erroneously-applied legal standard must lead to reversal. *Mikhael v. INS*, 115 F.3d 299, 305 (5th Cir. 1997). The Fifth Circuit decision in the present matter gave no indication of having applied the required level of scrutiny, and thus fails the "substantial evidence" standard, even if said standard were applicable.

It is submitted, however, that the "substantial evidence" standard cannot validly be applied where review of the BIA decision entails review of issues purely legal in nature. Well-settled caselaw grants de novo review power to the Courts of Appeals on questions of law. *See, e.g., Cardoza-Fonseca, supra,* 480 U.S. at 447-48. As noted, Mr. Belli argued to the Fifth Circuit that the BIA erred as a matter of law in requiring that he prove it was Algerian policy to commit military atrocities, and in requiring him to show international condemnation of the Algerian government. Where, as in the present matter, the issue before the Court of Appeals is not simply whether the record evidence supports a finding of well-founded fear of persecution, but a question is raised as well as to whether the BIA has applied an incorrect legal analysis, the "substantial evidence" review standard applied by *Elias-Zacarias* and other cases cannot serve as the sole basis for denial.

II. The BIA erred as a matter of law in the present case by requiring a showing that atrocities committed by the Algerian military were pursuant to government policy, and that the Algerian government had been condemned by "international governmental bodies."

The BIA has generally held that sovereign nations have the right "to require military service, and to enforce that requirement with reasonable penalties," and has accordingly rejected asylum claims based upon fear of retribution for mere refusal to serve in the military. *Matter of A-G-*, 19 I&N Dec. 502, 506 (BIA 1987) (refusal to serve in military of El Salvador in time of civil strife held not persecution). Exception is made to this BIA doctrine, however,

> in those rare cases where a disproportionately severe punishment would result on account of one of the five grounds enumerated in [8 U.S.C. Sect. 1101(a)(42)(A)], or where the alien would necessarily be required to engage in inhuman conduct as a result of military service required by the government.

Id. at 506 (citing OFFICE OF THE UNITED NATIONS HIGH COMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (Geneva, 1979) (hereinafter "UN Handbook")).

The BIA has imposed significant restrictions on the exceptions to its doctrine on military service issues, requiring a showing that "inhuman conduct" in the military be an actual policy of the government in question, and a further showing of "evidence of condemnation by

recognized international governmental bodies." *A-G-* at 506-07. As an example of the latter, it refers to a United Nations resolution criticizing the former South African government's military practices in support of its apartheid policy. *Id.* at 507.

A far different approach was taken by the BIA, however, in holding that an Afghani who refused to fight against his countrymen in service of the former Soviet-installed regime in Afghanistan met the definition of a refugee under U.S. asylum law. *Matter of Salim*, 18 I&N Dec. 311 (BIA 1982). No similarly restrictive requirements were imposed on this man, because of the obvious illegitimacy of the regime which sought his service. *See also Matter of Izatula*, 20 I&N Dec. 149, 153-54 (BIA 1990) (Soviet-installed regime could not legitimately punish one who worked to overthrow it, where there was no possibility of changing the government democratically). The claimant in *A-G-* sought to liken his situation to that found in *Salim*, but the BIA distinguished the latter case because Mr. Salim was refusing to serve, not in an army controlled by his own government, but in one which was "under Soviet command." *A-G-* at 507.

The Fourth Circuit has endorsed the BIA's approach in *A-G-*, including the requirements of showing an "inhuman conduct" policy and of "evidence of condemnation by recognized international governmental bodies." *M-A- v. U.S. I.N.S.*, 899 F.2d 304, 312 (4th Cir. 1990). This case was decided in the context of a motion to reopen, however, and the Court accordingly applied an especially deferential standard of review. *Id.* at 309. There was also a vehement and well-reasoned dissent which criticized

these restrictive requirements strongly. *Id.* at 316-27 (Winter, Senior Circuit Judge, dissenting).

It confounds logic to state with the BIA that a claimant in Mr. Belli's shoes must prove that the Algerian government has a policy per se that its military shall commit human rights abuses. Where could such proof be found? Few regimes would be so utterly unconcerned with world opinion as to make such a policy official and public. *M-A-, supra,* at 322 (dissent) (citing *Bolanos-Hernandez v. INS,* 767 F.2d 1277, 1285 (9th Cir. 1985), and *Ananeh-Firempong v. INS,* 766 F.2d 621, 628 (1st Cir. 1985)). Furthermore, the exception recognized by the BIA to its restrictive approach in military service cases – i.e., where military service would require impermissible abuses – is based upon paragraph 171 of the UN Handbook. *See A-G-, supra,* at 506. But the UN Handbook contains no requirement as to official government policies. *M-A-, supra,* at 322 (dissent). This nonsensical and unfair BIA rule must be rejected.

The BIA's requirement of condemnation by "recognized international governmental bodies" is similarly unworkable. Entities such as the U.N. are notoriously unable to produce clear censures, due to their political and "politically correct" nature. They require near-unanimity before they can act, and thus rarely act at all. It is accordingly unrealistic to require an asylum claimant to produce such a statement of condemnation. *See M-A-, supra,* at 322-23 (dissent). There is also no basis for the BIA's discounting of nongovernmental reports such as those submitted in the present case from Amnesty International and other organizations, which "have long been considered a valid source of international law." *See M-A-,*

supra, at 323-24 (dissent). This restrictive BIA rule should also be rejected.

Even if these two restrictive requirements could pass judicial scrutiny in a "normal" case, they should not be applied where, as in the present case, the government in question has no legitimate claim to power. It is maintained herein that the BIA erred in the present case in applying the more restrictive approach it took in *A-G-*, *supra*, on the military service issue, rather than following *Salim*, *supra*.

The underlying facts are not in dispute: as stated above, the Algerian government that sought to conscript Mr. Belli came to power by means of a coup following the cancellation of democratic elections that FIS was clearly going to win by a large margin. Evidence of this regime's viciousness, including reports prepared by the U.S. government itself, is found throughout the record in the present matter. A.R. at 172-338. Service in its military would necessarily entail attacks against the very populace that voted overwhelmingly for FIS, as this civil strife is the only Algerian military action apparent in the record. A.R. at 117. At least where, as here, the government gained power by patently illegitimate and anti-democratic means, and the military service it requires of its citizens is directed against the citizenry itself, the normal rules in asylum cases based upon refusal of military service should not apply.

It is submitted that the distinction advanced in *A-G-*, *supra* – i.e., that an exception to the normal restrictive approach in military service cases should only be made where the military service in question would be under

foreign command, while appearing to establish a "bright-line" rule, would actually be difficul' to apply and would lead to unfair results, and thus must be rejected. The reality of international politics and warfare is that it would often be difficult to point to any particular government or military and say with certainty that it is not controlled, influenced, infiltrated, or abetted by another sovereign. And it violates common sense and common notions of fairness to conclude that a "homegrown" regime or military is per se more legitimate and more entitled to sovereign privileges than one under outside influence. The present matter is a perfect illustration of this point.

The situation in Algeria also differs from that found, e.g., in Nicaragua and El Salvador, whence much or most of the military service caselaw originates. *See, e.g., A-G-* and *M-A-, supra*. In those countries there has been a history of ongoing internal struggle between more or less evenly-matched factions, with no side clearly able to claim the moral or democratic high ground. In Algeria, as noted, a democratic election by contrast produced a clear mandate for FIS, and that mandate was suppressed by brute autocratic military force. The Algerian regime is not entitled to deference under the circumstances.

The Algerian scenario is analogous to that in Afghanistan, as depicted in *Salim, supra*, in that the Algerian army has been forced into "dragooning" replacements because of "mass desertion" by its soldiers, and the present case just as much as *Salim* "clearly differs from persecution claims by aliens who merely seek to

avoid military service in their country." *Salim* at 313 (citing *Kovac v. INS*, 407 F.2d 102 (9th Cir. 1969)).

CONCLUSION

For the reasons set forth hereinabove, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

THOMAS PERRILL ADAMS
631 St. Charles Avenue
New Orleans, LA 70130
Telephone (504) 523-3815

Attorney of Record for
Petitioner Abdelhamid Belli

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 98-60409
Summary Calendar

ABDELHAMID BELLI,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
BIA No. A 74 697 691

(Filed Mar. 25, 1999)

Before DAVIS, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:[1]

Abdelhamid Belli appeals the decision of the Board of Immigration Appeals denying his application for asylum and withholding of deportation. After reviewing the record and the briefs of the parties, we find that substantial evidence supports the Board's decision that Belli is not eligible for asylum and withholding of deportation.

---

[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

See Carbajal-Gonzalez v. INS, 78 F.3d 194, 197 (5th Cir. 1996). Accordingly, Belli's petition for review is DENIED.

PETITION FOR REVIEW DENIED.

/s/ Illegible

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60409

ABDELHAMID BELLI

Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

Petition for Review of an Order
of the Board of Immigration Appeals
BIA No. A 74 697 691

(Filed May 04, 1999)

ORDER:

(X) The motion of petitioner for
(X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of petitioner for
(X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including ___, the stay is in force until the final disposition of the case by the supreme court, provided that the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed is also filed with this court within the time stated above. The clerk shall issue a mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of

this stay unless the certificate is filed with the clerk of this court within that time.

/s/ John M. Duhé, Jr.
JOHN M. DUHÉ, JR.
UNITED STATES CIRCUIT JUDGE

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A74 697 691 – New Orleans

In re: ABDELHAMID *BELLI*

IN DEPORTATION PROCEEDINGS

APPEAL (Filed Jun. 09, 1998)

ON BEHALF OF RESPONDENT: Thomas P. Adams, Esquire
631 St. Charles Avenue
New Orleans, Louisiana 70130

ON BEHALF OF SERVICE: Stan Weber
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] – Entered without inspection

APLICATION: Asylum; withholding of deportation

ORDER:

PER CURIAM: We affirm the Immigration Judge's decision for the reasons stated therein and adopt his findings and conclusions. The respondent failed to demonstrate that he suffered past persecution or has a well-founded fear of future persecution in Algeria on account of his race, religion, nationality, membership in a particular social group, or political opinion. *See* sections

101(a)(42)(A), 208(a), and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a), and 1253(h); *Ins v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

On appeal the respondent argues that the punishment he will face because he disobeyed the order to reenlist in the armed forces is disproportionate to his offense, citing *Matter of Vigil*, 19 I&N Dec. 572 (BIA 1988). The respondent then argues that punishment is persecution where the punishment is threatened for refusal to engage in conduct that would violate international human standards of warfare.

We have held that it is not persecution for a country to require military service of its citizens. *Matter of Vigil, supra; Matter of A-G-*, 19 I&N Dec. 502 (BIA 1987); *Glavic v. Beechie*, 225 F. Supp. 24 (S.D. Tex. 1963), *aff'd* 240 F.2d 91 (5th Cir. 1964). Exceptions to this rule may be recognized in those rare cases where a disproportionately severe punishment would result on account of one of the reasons specified in the Act, or where the alien would necessarily be required to engage in inhuman conduct as a result of military service required by the government. *Matter of A-G-, supra.*

The respondent has provided no support for his contention that he would face 10-15 years in jail and a possible death penalty for his refusal to serve in the military. The respondent has not supported his claim that he would be engaged in conduct that would violate international human standards of warfare. *Id.* The background information provided by the respondent confirms that government forces engage in abuses, but it does not

provide that such abuses represent the policy of the Algerian government or that the respondent would be required to engage in such actions as a member of the armed forces. Furthermore, the respondent has not submitted evidence of condemnation of the Algerian government by international governmental bodies. *Id.*

The Respondent further argues that 100 percent of his countrymen support the Islamist insurrection, the government is illegal, and a sovereign country cannot legitimately punish those who violate its laws such as conscription laws where the regime in power allows no chance for a change of power by democratic means, citing to *Matter of Izatula*, 20 I&N Dec. 149 (BIA 1990). The applicant in *Matter of Izatula* first claimed that he feared conscription by the Afghan army and we held that the applicant could not base a claim for asylum on his refusal to serve in his country's armed forces. *Id.* The applicant also claimed that he provided support for the mejuhedin, a faction fighting the Afghanistan government. The issue was whether the punishment the applicant might receive at the hands of the Afghanistan government for his support of the mujahedin would be an example of a legitimate and internationally recognized government taking action to defend itself from an armed rebellion. *Id.* We held that any punishment the Afghan government might impose would not be a legitimate exercise of sovereign authority. The respondent in this case has not alleged that he would suffer punishment for his support of the Islamist insurrection and therefore our holding in *Matter of Izatula* is inapplicable to this respondent's asylum claim.

The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart form the United States voluntarily without expense to the government within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. In the event of his failure to so depart, the respondent shall be deported as provided in the Immigration Judge's order.

/s/ Patricia A. Cole
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEW ORLEANS, LOUISIANA

File No. A 74 697 691 November 1, 1996

In the Matter of

ABDELHAMID BELLI)
) IN DEPORTATION
Respondent) PROCEEDINGS

CHARGES: Section 241(a)(1)(B) INA (entry without inspection);

APPLICATIONS: Asylum/withholding of deportation and in the alternative, voluntary departure.

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE SERVICE:
Thomas P. Adams, Esquire	John D. Carte, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

This is a deportation proceeding brought by the Immigration and Naturalization Service, against the named respondent, when he was served with an Order to Show Cause, which was filed with the Court (Exhibit 1). The Service alleges that the respondent is not a citizen or national of the United States, but is a native and citizen of Algeria. They further allege that the respondent entered the United States at New Orleans, Louisiana on or about October 3, 1995, without being inspected by an Immigration Officer. Deportability was charged for entry without inspection, pursuant to Section 241(a)(1)(B) of the Act.

The respondent admitted all allegations and conceded deportability. Based upon those admissions, deportability had been established by clear, convincing and unequivocal evidence.[1]

The respondent designated Switzerland for deportation, should deportation become necessary. In the alternative, Algeria was designated by the Court.

As relief, the respondent seeks asylum in the United States and has submitted an application in support thereof (Group Exhibit 2). This is also considered to be a request for the withholding of his deportation to Algeria, pursuant to Section 243(h). In the alternative, he seeks to depart voluntarily.

The Court has considered all the evidence of record, even if not specifically addressed in this decision. This includes the multitude of materials attached to his application (Group Exhibit 2), which include documentation to show that he had both been in the military in Algeria as well as a government employee. And, newspaper articles,

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[1] It actually appears that the respondent is likely to have arrived and made entry into the United States as a stowaway, upon board a vessel. However, the Immigration Service did not proceed against the respondent as a stowaway, was not charged as a stowaway, and therefore the matter of the respondent being in deportation proceedings, and potential relief were not raised by either party during the proceedings. The Court noted that the respondent's subsequent statement as contained within Group Exhibit 2, Exhibit 1, page six, gave rise to the Court's question to the respondent, as far as his manner of arriving in the United States. However, no other charges have been brought against the respondent and therefore the charge as it exists is the only [sic] before the Court.

Country Reports on Human Rights Practices, speaking to issues of on-going violence of the severe nature in Algeria. The Court has also considered the opinion from the Department of State (Exhibit 5), which is advisory nature only, but is considered as one further piece of evidence. The Court has considered the article showing that the mayor of Algers was recently killed (Exhibit 6) as well as the letter from the respondent's father warning him not to return to Algeria (Exhibit 7).

The Court has also considered the testimony of the respondent's roommate in the United States, Abdelaziz Ketani, who also knew the respondent in Algeria.

The Court generally found the respondent to be testifying in a credible fashion and accepts his testimony as given. He had been in the military in Algeria between 1987, September and 1989, September. He subsequently worked in the ministry of education as an administrative assistant for a period of five years. That actually coincided during the increase of violence and problems in Algeria, as he started working in 1991.

He decided to leave Algeria when he was along with others, recalled to military service to fight the Islamic militants. Although there had been on-going violence of a severe nature in Algeria, from 1991 forward, the respondent did not decide to leave Algeria until he was recalled to military service.

He says that he does not want to have to fight against his fellow countrymen, and at the same time he is afraid of what would happen to him if he fails to report for service. It is noted that even according to the testimony of

the respondent, all those persons who had served in the military from 1989 to 1994, were subject to recall.

There does not appear to be a distinction between the situation of the respondent and other persons who had served in the military during that time period. The respondent has presented no evidence to show that the possibility of imprisonment and/or further punishment, for failing to report to military service (even though recalled), is in any way different from any other persons who had been within the active military who also were recalled for service. Indeed, there has been no showing by the respondent that this was an exception, i.e., after serving in the military for one to be recalled into military service.

It is quite reasonable for a person to want to avoid the violent situation that has been on-going in Algeria. I believe it would be unreasonable for a person to want to live within that situation. That, however, does not answer the question of whether the respondent is eligible for asylum. For asylum, he must show that he is a "refugee" as defined in Section 101(a)(42)(A) of the Act. This requires past persecution or a well-founded fear of persecution, owing to the respondent's race, religion, nationality, membership in a particular social group, and/or his political opinion. See *Matter of Mogharrabi*, 19 I&N 439 (1987). See *INS v. Cardoza-Fonseca*, 107 Supreme Court 1207 (1987).

Although his fear of harm may be quite legitimate, in the opinion of the Court, it is not owing to his race, his religion, his nationality, his membership in a particular social group or his political opinion. The reason he fears

punishment by the government is because of his refusal to report for military duty when recalled to do so. This is not shown to be persecution but rather punishment. The respondent has not shown, by any evidence that the possible actions taken against him for refusing to be recalled into military service, are persecutive in nature.

The respondent does not want to report for military duty because of the possibility of his having to fight against fellow Algerians. He notes in his neighborhood, he estimates that 100 percent of the population is aligned with the Islamic militants. He also says, however, that in other areas, they have less of a strong hold. He says they are centered around the city of Algers and within the city of Algers.

The respondent did not stop working for the government of Algeria, during the years that the violence had been on-going in Algeria, from 1991 on. Again, the only time he decided that he didn't want to work for the government and serve in the military, was when he was recalled to military duty.

The request for asylum is denied.

While asylum is discretionary in nature, request for withholding of deportation has no element of discretion contained therein. An individual would have to show that it is more likely than not that they would face persecution based upon any of the five enumerated grounds. See *INS v. Stevic,* 104 Supreme Court 2489 (1984). The request for withholding of deportation is denied as the respondent has failed to show a well-founded fear of persecution. He has also failed to show the higher standard necessary for withholding. The letter from the

respondent's father, again, shows that he is wanted for military service.

Turning to voluntary departure, as the respondent is charged as one who has entered without inspection, he states that he does have the funds available to him to pay for his transportation to depart the United States and his willingness to do so. He also indicates that he has never been convicted of any offense. In the discretion of the Court, the respondent will be granted the privilege of departing voluntarily at no cost to the United States Government on or before December 1, 1996.

ORDER

IT IS FURTHER ORDERED that if the respondent fails to leave by the date or by such date as may be extended, the privilege shall be withdrawn without further notice or hearing and will convert automatically to an Order of deportation to Switzerland.

IT IS FURTHER ORDERED that if Switzerland fails to accept the respondent and if deportation became necessary, that the alternate designation of Algeria shall become effective.

JEFFREY ZLATOW
Immigration Judge

Supreme Court, U.S.
FILED
SEP 22 1999
OFFICE OF THE CLERK

(2)

No. 98-2056

In the Supreme Court of the United States

ABDELHAMID BELLI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

LINDA S. WENDTLAND
CARL H. MCINTYRE
ELLEN SUE SHAPIRO
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1288

QUESTION PRESENTED

Whether substantial evidence supports the Board of Immigration Appeals' denial of asylum and withholding of deportation to petitioner, who fears punishment for his failure to comply with his government's recall to military service.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Barraza Rivera v. *INS*, 913 F.2d 1443 (9th Cir. 1990)	6
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	9
INS v. *Aquirre-Aquirre*, 119 S. Ct. 1439 (1999)	3, 7
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	2, 7
INS v. *Stevic*, 467 U.S. 407 (1984)	3
Izatula, In re, 20 I. & N. Dec. 149 (1990)	8
M.A. v. *INS*, 899 F.2d 304 (4th Cir. 1990)	6, 7
Salim, In re, 18 I. & N. Dec. 311 (1982)	8

Statutes and regulations:

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Tit. IV, 110 Stat. 1258:	
Subtit. B, 110 Stat. 1268:	
§ 413(f), 110 Stat. 1269	3
§ 413(g), 110 Stat. 1269-1270	3
Subtit. C, 110 Stat. 1270:	
§ 421(a), 110 Stat. 1270	2
§ 421(b), 110 Stat. 1270	2
Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*	1
8 U.S.C. 1101(a)(42)(A) (1994)	2
8 U.S.C. 1158(a) (1994)	2
8 U.S.C. 1231(b)(3) (Supp. IV 1998)	3
8 U.S.C. 1251(a)(1)(C)(i) (1994)	4

Statutes and regulations—Continued: Page

8 U.S.C. 1253(h)(1) (1994) 3
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:
Tit. III, Subtit. A, 110 Stat. 3009-575:
§ 305(a)(3), 110 Stat. 3009-602 3
§ 309(a), 110 Stat. 3009-625 3
Tit. VI, Subtit. A, 110 Stat. 3009-689:
§ 604, 110 Stat. 3009-690 2
§ 604(c), 110 Stat. 3009-694 2
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 1-2
8 C.F.R.:
Section 208.13(a) 2
Section 208.16(b) 3

Miscellaneous:

United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (rev. ed. Jan. 1992) 7

In the Supreme Court of the United States

No. 98-2056

ABDELHAMID BELLI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 177 F.3d 979 (Table). The decision and order of the Board of Immigration Appeals (Pet. App. 5-8) and the decision and order of the immigration judge (Pet. App. 9-14) are unreported.

JURISDICTION

The court of appeals entered its judgment on March 25, 1999. The petition for a writ of certiorari was filed on June 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1101 *et seq.*, as amended by the Refugee

Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, provides that an alien will be considered a "refugee" if he "is unable or unwilling to return to" his home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A) (1994). If the "Attorney General determines" that an alien qualifies as a refugee, the Attorney General may grant that person asylum in the United States, 8 U.S.C. 1158(a) (1994). An alien claiming eligibility for asylum need only demonstrate a reasonable fear or risk of persecution. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-441 (1987). The alien bears the burden of proving that he is a refugee because he has the requisite well-founded fear of persecution. 8 C.F.R. 208.13(a). Once an alien has established his eligibility for asylum, the decision whether to grant or deny asylum falls within "the discretion of the Attorney General." 8 U.S.C. 1158(a).[1]

In addition, "if the Attorney General determines" that an alien's "life or freedom would be threatened" in the country of deportation "on account of race, religion,

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[1] Section 604 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. VI, Subtit. A, 110 Stat. 3009-690, significantly revised the INA's asylum provision. That amendment, however, does not govern the present case because it applies to applications for asylum filed on or after April 1, 1997. IIRIRA § 604(c), 110 Stat. 3009-694. The changes in asylum worked by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV, Subtit. C, § 421(a), 110 Stat. 1270, do apply to this case because the AEDPA amendment governs asylum determinations made on or after the amendment's effective date of April 24, 1996. AEDPA § 421(b), 110 Stat. 1270. The AEDPA amendment, however, is not pertinent to petitioner's claim.

nationality, membership in a particular social group, or political opinion," the alien may be eligible for "withholding of deportation or return." 8 U.S.C. 1253(h)(1) (1994). To be entitled to relief under that provision, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (applicant bears the burden of proof of eligibility for withholding of deportation). If the alien makes such a showing, withholding of deportation is mandatory. 8 U.S.C. 1253(h)(1).[2]

2. Petitioner is a native and citizen of Algeria. Pet. App. 9. Petitioner served in the Algerian military from 1987 to 1989. *Id.* at 11. From 1991 to 1995, petitioner worked for the Algerian government in the Ministry of Education. *Ibid.* Petitioner's employment by the Ministry of Education coincided with a significant increase in hostilities between the Algerian government and Islamic militants seeking to overthrow the government. *Ibid.* The Algerian government subsequently recalled to military service petitioner and all other persons who had served in the military between 1989 and 1994. *Id.* at 11-12.

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[2] IIRIRA substantially revised the INA's withholding-of-deportation provisions, see IIRIRA, Div. C, Tit. III, Subtit. A, § 305(a)(3), 110 Stat. 3009-602, which are now codified at 8 U.S.C. 1231(b)(3) (Supp. IV 1998). IIRIRA does not govern the present case because its provisions apply only to applications for withholding of deportation filed by aliens who are placed in proceedings on or after April 1, 1997. IIRIRA, § 309(a), 110 Stat. 3009-625. AEDPA's changes in the withholding provision (see Pub. L. No. 104-132, Tit. IV, Subtit. B, § 413(f), 110 Stat. 1269) do apply because the Board's final decision was not issued until after AEDPA's date of enactment. See § 413(g), 110 Stat. 1269-1270; see also *INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1443 (1999). The AEDPA amendments, however, are not pertinent to petitioner's claim.

Rather than comply with the military recall, petitioner fled to the United States where he entered in October 1995 without inspection by an immigration official. Pet. App. 9. The Immigration and Naturalization Service (INS) subsequently commenced deportation proceedings against petitioner. *Ibid.*; see also 8 U.S.C. 1251(a)(1)(C)(i) (1994). Petitioner conceded deportability, but sought asylum and withholding of deportation based on his fear of punishment by the Algerian government for his resistance to military service. Petitioner explained that he did not want to have to fight against his fellow citizens, but that he also feared that his failure to report for military duty could result in imprisonment for up to 15 years. Pet. App. 6, 11. Petitioner further argued that military service would require him to engage in conduct that would violate international human rights standards. *Id.* at 6.

3. The immigration judge denied petitioner's application for withholding of deportation and asylum, but granted him voluntary departure. Pet. App. 9-14. The immigration judge found that petitioner presented "no evidence" that the punishment he faced for avoiding military service was "in any way different from any other persons" who had been recalled, and thus did not create the requisite risk of persecution on the basis of his race, religion, nationality, political opinion, or membership in a particular social group. *Id.* at 12. The immigration judge further found that petitioner's desire not to fight against his fellow Algerians did not transform the government's punishment of his resistance into persecution on the basis of political opinion or another protected characteristic. *Id.* at 13.

The Board of Immigration Appeals affirmed. Pet. App. 5-8. The Board found "no support" for petitioner's contentions either that he would face 10 to 15 years in

jail and a possible death sentence for his resistance to military service or that a disproportionate punishment would be imposed because of petitioner's political opinions or any other protected characteristic. *Id.* at 6. The Board also rejected petitioner's claim that he should be granted relief because he would be forced to engage in inhumane conduct. The Board explained that petitioner's evidence showed only that some government forces engage in abuses, not that he "would be required to engage in such actions as a member of the armed forces" or that such abuses were condoned or encouraged by the Algerian government. *Id.* at 6-7. The Board also noted that the Algerian government has not been condemned by international governmental bodies for such conduct. *Id.* at 7.

4. The court of appeals affirmed. Pet. App. 1-2. The court concluded that substantial evidence supports the Board's decision that petitioner is ineligible for withholding of deportation or asylum based on his resistance to military service. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 12-17) that the court of appeals erred in sustaining the Board's requirement that, in order to demonstrate that military service would entail engaging in human rights violations, petitioner must show that the commission of atrocities by the military was pursuant to governmental policy. He also argues (*ibid.*) that the Board erred in requiring evidence of condemnation of the Algerian government by "international governmental bodies." Those claims do not merit review.

First, there is no conflict in the circuits. To the contrary, as petitioner notes (Pet. 13), the Board's rules are consistent with the ruling of the en banc Fourth

Circuit in *M.A.* v. *INS*, 899 F.2d 304 (1990). That decision upheld the Board's requirements both of governmental endorsement of inhumane military conduct and of condemnation by the international community, rather than just by private interest groups. *Id.* at 312-313; see also *Barraza Rivera* v. *INS*, 913 F.2d 1443, 1453 & n.14 (9th Cir. 1990) (acknowledging requirement that atrocities committed by military be endorsed by government, and finding it satisfied where individual directly ordered by higher military officials to undertake assassinations).

Second, the Board's requirement that applicants identify not just sporadic instances of military atrocities, but a systematic governmental policy of encouraging or tolerating such practices is appropriate. As the Fourth Circuit explained in *M.A.*:

> Misconduct by renegade military units is almost inevitable during times of war, especially revolutionary war. * * * Without a requirement that the violence be connected with official governmental policy, however, *any* male alien of draft age from just about any country experiencing civil strife could establish a well-founded fear of persecution. The Refugee Act does not reach this broadly.

899 F.2d at 312. That rationale applies with particular force in the present case, where petitioner introduced no evidence that he individually would be compelled to engage in inhumane conduct (Pet. App. 7) and where petitioner previously served in the military for two years without incident.

The Board's reluctance to accord significant weight to reports of human rights violations by private groups was also proper. Again, as the Fourth Circuit explained in *M.A.*:

> We are also uncertain of the criteria by which courts would analyze the reports of private groups. Presumably, if any private organization condemns the acts of some members of the military in a country at war, these condemnations would serve as the basis for asylum eligibility. Although we do not wish to disparage the work of private investigative bodies in exposing inhumane practices, these organizations may have their own agendas and concerns, and their condemnations are virtually omnipresent.

899 F.2d at 313. Indeed, the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (rev. ed. Jan. 1992) (UNHCR Handbook), also requires that the government's violence must be "condemned by the international community," *id.* at para. 171, and not just by private entities.[3]

The Board's determination of whether and how the compelled commission of atrocities by military units will establish persecution by the government on the basis of a prohibited factor, moreover, merits substantial deference. See *INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1445-1446 (1999).[4]

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[3] See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (UNHCR Handbook can provide "significant guidance" in construing the INA's provisions); cf. *INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1447 (1999).

[4] Petitioner contends (Pet. 15) that, even if the Board's approach is correct in "a 'normal' case," a different rule should apply when "the government in question has no legitimate claim to power." The Board explained in its opinion (Pet. App. 7), however, that it found factually inapplicable to petitioner's case those decisions dealing with punishments imposed by governments that are not "legitimate and internationally recognized." In particular, the

Third, the Board's decision, which the court of appeals affirmed, did not turn solely upon petitioner's lack of evidence of a governmental policy endorsing atrocities or of international condemnation of the Algerian government. In addition to those findings, the Board ruled, in the alternative, that petitioner failed to show that he "would be required to engage in such [inhumane] actions as a member of the armed forces." Pet. App. 7. Petitioner does not contend that the Board's identification of this alternative deficiency in his evidence represented legal error. Thus, even were this Court to disagree with the Board's interpretation of the relevant provisions of the INA, the ruling would be of no assistance to petitioner because of his inability to demonstrate that he would be persecuted by the Algerian government for refusal to engage in internationally condemned conduct, rather than simply punished for draft resistance.

Board found petitioner's analogy to cases involving Afghani refugees inapt because, in those cases, the Board found that the Afghan government and military were under the complete control of a foreign government (the Soviet Union), and the government sought to punish individuals not just for draft resistance, but also for their active support of a group that sought to overthrow the government, and thus sought to persecute them on the basis of political opinion. See Pet. App. 7 (describing decision in *In re Izatula*, 20 I. & N. Dec. 149 (1990); see also *In re Salim*, 18 I. & N. Dec. 311, 312 (1982) (draft resistor was also a former member of the Mujahidin rebels). Petitioner makes no claim that he has supported the Islamic opposition to the Algerian government, that the Algerian government seeks to persecute him on that basis, or that the Algerian government for which petitioner worked for the five years immediately preceding his departure to the United States lacks all trace of domestic legitimacy because it is under the domination of a foreign power.

Finally, petitioner argues (Pet. 10-11) that review is warranted because the court of appeals summarily disposed of his arguments under the substantial evidence standard, without discussing his other legal challenges in its opinion. As explained, however, that substantial evidence disposition was appropriate because petitioner's legal challenges address alternative rulings of the Board. The Board's determination that petitioner presented no evidence that he would personally be compelled to engage in inhumane conduct provided an independent and sufficient basis for disposing of his claims, and petitioner has challenged that aspect of the Board's ruling only on substantial evidence grounds. See Pet. C.A. Br. 15.

In any event, because this Court reviews judgments and not opinions, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), and the court of appeals' judgment was correct, petitioner's objection to the content of the court of appeals' opinion presents no broad issue of enduring importance and thus does not merit an exercise of this Court's certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
LINDA S. WENDTLAND
CARL H. MCINTYRE
ELLEN SUE SHAPIRO
Attorneys

SEPTEMBER 1999